

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FLETCHER SMALL #162139,

Plaintiff,

Case No. 1:19-CV-348

v.

HON. GORDON J. QUIST

UNKNOWN BROCK,

Defendant.

ORDER ADOPTING REPORT AND RECOMMENDATION

This is a civil rights action brought by state prisoner Fletcher Small pursuant to 42 U.S.C. § 1983. Defendant, Jason Brock, filed a motion for summary judgment based on exhaustion. (ECF No. 32.) Small never filed a response. On July 13, 2021, U.S. Magistrate Judge Ray Kent issued a Report and Recommendation (R & R), recommending that the Court grant Defendant's unopposed motion for summary judgment. (ECF No. 35). Small subsequently filed an objection to the R & R. (ECF No. 38.) But because Small has never filed a response to Defendant's motion, his objection is a new argument that was not raised before the magistrate judge. This Court typically does not consider arguments raised for the first time in objections. *See Murr v. United States*, 200 F.3d 895, 902 n.1 (6th Cir. 2000); *Marshall v. Chater*, 75 F.3d 1421, 1426-27 (10th Cir. 1996) (collecting cases); *see also Uduko v. Cozzens*, 975 F. Supp. 2d 750, 757 (E.D. Mich. 2013) ("Any arguments made for the first time in objections to an R & R are deemed waived.").

Nonetheless, even if this Court were to consider Small's objection, it is without merit. The MDOC policy requires an inmate to attempt to resolve a problem within two days of becoming aware of the grievable issue, unless prevented by circumstances beyond his control. *See Policy*

Directive 03.02.130 (effective July 9, 2007) at ¶ P. If the issue is not resolved, the inmate may file a Step I grievance within five business days. *Id.* at ¶¶ P and R. Here, Small filed his Step I grievance on February 10, 2019. (ECF No. 33-3 at PageID.141.) He identified the “Date of the Incident” as “In December 2018.” (*Id.*) The MDOC rejected this grievance as untimely at Step I and the rejection was affirmed at Steps II and III. (*Id.* at PageID.138-142.) Even though Small may have approached Captain King to discuss the problem on February 8, 2019, the grievable incident occurred over a month earlier. Small has not alleged that any circumstance beyond his control prevented him from filing the grievance. Thus, the MDOC properly rejected the grievance as untimely, and Small did not exhaust his claim. Accordingly, the Court will adopt the R & R.

THEREFORE, IT IS HEREBY ORDERED that the July 13, 2021, Report and Recommendation (ECF No. 35) is **adopted** as the Opinion of the Court.

IT IS FURTHER ORDERED that Defendant’s motion for summary judgment (ECF No. 32) is **GRANTED** for the reasons set forth in the R & R. Therefore, Plaintiff’s claims are **dismissed without prejudice**.

This case is **concluded**.

A separate judgment will enter.

Dated: September 7, 2021

/s/ Gordon J. Quist

GORDON J. QUIST
UNITED STATES DISTRICT JUDGE